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Supreme Court of the United States

October Term, 1943

No. 618

NEW SOUTHERN OHIO GAS COMPANY
and CHARLES EBERSBACH,
PETITIONERS.

v.

SYLVIA ROUSH, WILBUR ROUSH, EBER ROUSH,
SADIE ROUSH GRINDLEY, GEORGE ROUSH,
FLORA ROUSH, FLOSSIE ROUSH AND
LILLIAN ROUSH DURST.
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The petitioner, New Southern Ohio Gas Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered on the twenty-first day of October, 1943, in the above entitled cause (R. 81).

Judgment Below

The decision of the court below is reported in 138 F. (2d) page 411.

Jurisdiction

This court has jurisdiction to review said decision under Section 240 of the Judicial Code (28 USCA #347).

This case presents an important question of general law, namely, does the rule of the Circuit Court of Appeals, applied in this case, deprive litigants in the Sixth Circuit of the full review accorded litigants in other circuits in appeals from decisions based upon undisputed facts or conclusions of law? The case has arisen over the construction, by the referee in a reopened bankruptcy case, of an order made June 26, 1936, in the same case by the former referee. The petitioners appealed and the Circuit Court of Appeals declined to disturb the referee's construction of said order on the ground that a referee's "*finding of fact* should not be disturbed for anything less than a demonstration of plain mistake" (R. 81).

We find that the ruling of the Circuit Court of Appeals that the *conclusion* of the referee was a *finding of fact,* and binding on the reviewing court, is in conflict with the doctrine announced by the Circuit Courts of Appeals for the Second, Third, Fifth, Seventh, Eighth and Ninth Circuits.

Questions Presented

The questions presented in this case may be stated in the form of the petitioners' claim, as follows:

1. The referee in bankruptcy, in determining the question submitted to him, was required to construe and to determine the legal effect of an order entered by a former referee (order of June 26, 1936, R. 8) and such construction, under the correct rule, (Second, Third, Fifth, Seventh and Eighth Circuits) is reviewable for the reason that it is not a "finding of fact" but a conclusion of law not binding upon the reviewing Court.

2. The rule in the Circuit Court of Appeals for the Sixth Circuit, applied in this case, is in conflict with the correct rule (Second, Fifth, Seventh, Eighth and Ninth Circuits) whether the referee's decision was a conclusion of law or finding of fact, because in either case the "finding" resulted in a miscarriage of justice, was based upon non-conflicting, documentary evidence, not involving any question of credibility or weight, and the appellate court was in as good a position to reach a correct conclusion as was the referee.

Note A. Questions 1 and 2 arise out of the decision of the Circuit Court of Appeals and are presented by this petition to the Supreme Court.

3. The intent and legal effect of the order of the District Court entered June 26, 1936, (R. 8) was to sell or "distribute" to petitioners the remaining assets of the bankrupt, including the bankrupt's interest in a certain oil and gas lease known as the Roush lease.

4. The respondents, the Roush heirs, are not proper parties in interest and have no right to object to the relief prayed for by the petitioners, to which no creditor has objected.

Note B. Questions 3 and 4 were presented to the Circuit Court of Appeals, not considered on the merits by that court, and therefore remain to be decided.

The questions thus presented may be stated as interrogatives, together with the correct answer as maintained by the petitioners, as follows:

1. Was the decision of the Circuit Court of Appeals, that the referee's conclusion was a finding of fact, in conflict with the decisions of other circuit courts of appeal? Yes.

2. Was the decision of the Circuit Court of Appeals, that it should not review the referee's finding, in conflict with the decisions of other circuit courts of appeals? Yes.

3. Was it the intent and effect of the order of June 26, 1936, to distribute to New Southern Ohio Gas Company all of the assets of Southern Ohio Gas Company, bankrupt, not previously sold to New Southern Ohio Gas Company? Yes.

4. Are the Roush heirs (respondents) proper parties in interest with a right to object to the relief asked for by petitioners, to which no creditor has objected? No.

STATEMENT

After notice to creditors (R. 6) the trustee in bankruptcy filed on June 26, 1936, a report of sale or "distribution of assets of the bankrupt" to the petitioner, New Southern Ohio Gas Company (R.7) a new corporation "ordered by the court to be formed for the purpose of acquiring the assets of the bankrupt". (R. 6). On June 26, 1936, the referee heard said report of distribution and confirmed said sale or "distribution" (R. 8). Among said assets was the lessee 7/8 working interest in the Roush lease, in which the Roush heirs, respondents, held the lessor 1/8 royalty interest (R. 10-12).

The bankruptcy case was thereupon closed and the new corporation took possession of all of the assets although no formal bill of sale nor assignment was executed. (R. 2).

(The respondents as well as the petitioners construed the order of June 26, 1936, as transferring said lessee interest in the Roush lease to petitioner, New Southern Ohio Gas Company (R. 13); and in 1941 the respondents requested the new company to drill a well on the premises (R. 14, 25, 26, 28) and told Roy Proffitt, a well drilling contractor, that the lease was owned by New Southern Ohio Gas Company (R. 22). Relying upon the respondents' request and representation, a gas well was drilled (R. 23, 14). Before the well was completed the Roush heirs denied (R. 16) the new company's ownership.)

On application of the petitioners the bankruptcy cause was reopened April 10, 1941, (R. 2) and the company of creditors and Charles Ebersbach, former trustee, applied for formal assignment and bill of sale of the assets from the bankrupt company to the new company (R. 10). The Roush heirs, *who were not creditors and had no interest in the question of title to assets of the bankrupt company,* filed a motion to vacate the order reopening the estate. The Court overruled the motion to vacate (R. 31) but the Roush heirs were permitted to continue as "parties" (R. 32) and eventually obtained about the same effect as if the motion to vacate had been sustained, because the referee, confirmed by the District Court, incorrectly construed the order of June 26, 1936, and the Circuit Court of Appeals incorrectly regarded such construction as a *finding of fact* and declined to review on the merits.

Rulings of the Court Below

June 26, 1936. The District Court made an order confirming distribution of "the assets of the bankrupt" (R. 7, 8) to New Southern Ohio Gas Company, "a corporation ordered by the court to be formed for the purpose of acquiring the assets of the bankrupt" (R. 6).

April 10, 1941. The District Court reopened the case, the court finding "that, although the referee intended the distribution of all the assets of the bankrupt by the transfer thereof to the new corporation and the new corporation actually took possession of all of the assets, yet there was no formal bill of sale nor assignment and certain assets of the estate were not fully administered" (R. 2); notwithstanding a very much later attempt by the court to delete said finding (R. 47).

December 31, 1941. The referee held that New Southern Ohio Gas Company was "not entitled to a conveyance of whatever interests the bankrupt may have had in the Roush lease" (R. 37).

December 14, 1942. The District Court confirmed the order of the referee (R. 47, 48).

October 21, 1943. The Circuit Court of Appeals declined to review on the merits, holding that the construction of the intent and legal effect of the order of June 26, 1936, was a *finding of fact,* and affirmed the order of the District Court (R. 81).

Reasons for Granting the Petition

The Circuit Court of Appeals held that the referee's order, filed December 31, 1941, construing the order of the former referee, filed June 26, 1936, was a finding

of fact. The decisions in *Bendix Home Appliances, Inc.* v. *Radio Accessories Company,* 8 Cir., 129 F. (2nd) 176, *Midwood Association, Inc.* v. *Commissioner of Internal Revenue,* 2 Cir., 115 F. (2d) 871, and other representative authorities cited in petitioners' brief, representing the weight of authority, hold that the construction of a writing is the determination of its meaning and legal effect and, therefore, is a conclusion of law not binding on a reviewing court.

The Circuit Court of Appeals further held that the "finding of fact" of the referee should not be disturbed for anything less than a demonstration of plain mistake, notwithstanding the fact that the record before the referee contained no conflict of evidence, involved no question of weight or credibility, and the "finding" resulted in a miscarriage of justice. The decisions *In re John Koke Co.,* 9 Cir., 38 F. (2d) 232, and *In Re Sullivan,* 7 Cir., 29 Fed. 66, and other representative authorities cited in petitioners' brief, representing the weight of authority, hold that an appellate court is not bound by findings of fact made on such a record, the reviewing judges being in as good a position as the referee to consider and determine undisputed facts. Furthermore, the appellate courts of other circuits hold that a full review will always be granted when necessary to prevent miscarriage of justice.

In the foregoing respects the decision of the Circuit Court of Appeals is in conflict with the great weight of authority with the result that, in the Sixth Circuit, appellants are wrongfully deprived of a review not only in all cases in which, as in the case at bar, a mere conclusion of law is erroneously designated as a "finding of fact", but also in all cases in which there is an actual finding of fact based upon documentary or undisputed

evidence not involving weight or credibility, and also in all cases where a review is necessary to prevent a miscarriage of justice. The Sixth Circuit rule violates the accepted principle of one trial and one review, because it denies a review on the merits in a very substantial class of cases.

For these reasons, it is respectfully submitted that this petition should be granted.

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IN THE SUPREME COURT OF THE UNITED STATES

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RESPONDENTS

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Circuit Court of Appeals

The only opinion rendered by the court below was the per curiam judgment entered by Judge Florence E. Allen October 21, 1943, (R. 81), 138 F. (2d) 411. Appendix A.

Jurisdiction

The jurisdiction of this court is involved under Section 240 of the Judicial Code (28 USCA #347). The judgment of the Circuit Court of Appeals was entered October 21, 1943. The petition was filed January ....., 1944.

The Facts

The facts are stated in the petition, page 4. We emphasize that the facts herein are entirely undisputed.

The second paragraph of the statement, referring to the request of the Roush heirs that petitioner drill a well on the lease, the reliance of Proffitt and petitioner on such request, and the subsequent controversy concerning the ownership of the lease and the oil well drilled thereon by petitioner and Proffitt, are merely explanatory of the circumstances preceding the reopening of the bankruptcy proceedings and are not primary facts involved in the question before the referee. The merits of any controversy between petitioner and the Roush heirs were not involved in such questions. As the referee stated, "there is no need to consider the rights of the Roush heirs as compared with the rights of the corporate applicant". (R. 43).

Incidentally, the same second paragraph shows that the referee's conclusion results in gross, unnecessary miscarriage of justice.

SPECIFICATION OF ERROR

The Circuit Court of Appeals for the Sixth Circuit has adopted the general rule that a finding of fact by a referee, confirmed by the district court, should not be disturbed for anything less than a demonstration of plain mistake. The rule so stated is incomplete and ignores a well established exception within the scope of which the instant case falls. Fully stated, the correct rule is that a finding of a referee, confirmed by a district court, should not be disturbed for anything less than a demonstration of plain mistake, unless the finding is *based upon documentary or other evidence which*

is not conflicting, involving no question as to weight or credibility.

As stated in the petition, one of the grounds for the issuance of the writ herein is the conflict between the limited or incomplete rule of the Sixth Circuit and the correct rule of other circuits, and we respectfully maintain that the application by the Circuit Court of Appeals of an incorrect rule in conflict with the correct rule was prejudicial error resulting in a miscarriage of justice.

Moreover, the Circuit Court of Appeals, in conflict with the decisions of other circuits, erroneously regarded the order of the Referee, construing an order of a former referee, as a *finding of fact* instead of as a *conclusion of law,* with the result that petitioners were denied the full review on the merits that would have been accorded them in other circuits.

ARGUMENT

I.

The referee in bankruptcy was required to determine the legal effect of a certain order made by a former referee (R. 8) and in so doing reached not a "finding of fact" but a conclusion of law.

The Corporate petitioner maintains that, under the undisputed facts, it is entitled to receive the assets of the bankrupt pursuant to the order of June 26, 1936, (R. 8) confirming the trustee's report of distribution of the assets likewise filed June 26, 1936. (R. 7). The case being reopened May 10, 1941, (R. 2) for the express purpose of obtaining a formal written transfer of said assets, it was the duty of the new referee to

read the record and determine the legal effect of said order made by the former referee about four years prior thereto. The only question before the referee was as to the meaning and legal effect of the former order. There was no dispute as to the facts, the existence of the order and the exact terms thereof being unquestioned. The new referee was merely required to construe said order and determine whether, as between the trustee for the bankrupt and the corporation of creditors, the latter was entitled to the assets.

The referee held that the corporation of creditors (petitioner) was not entitled to that portion of the assets known as the Roush Lease. The order of the referee was confirmed by the District Court. The Circuit Court of Appeals, applying the harsh rule of the Sixth Circuit as to orders of a referee confirmed by a judge, treated the referee's conclusion as a "referee's finding of fact that the Roush lease had not been conveyed to the appellant company." Under the rule of other Circuits such a decision, even though confirmed by the district judge, is treated not as a finding of fact, but as a conclusion of law, not depriving the Appellant of a full review on the merits.

Bendix Home Appliances v. *Radio Accessories Corp.* 8 Cir., 129 F. (2d) 177, The Court says, at page 182.

> "It is true that the court denominated its holding a finding of fact, but the matter involved was the construction of the contract, a question of law. Its inclusion within the court's finding of fact is not determinative of its real nature nor is it binding upon this court."

Midwood Associates, Inc. v. *Comm. of Internal Revenue*; 2 Cir., 115 F. (2d) 871, Syllabus;

> "Where resolution by directors of a corporate lessor ----- was construed by the Board of Tax

> Appeals as being neither an assignment nor a declaration of trust, for tax purposes, the determination of the Board was not a 'finding of fact' but was an interpretation of a written document which the court was free on review to construe for itself."

Lambert Lumber Co. v. *Jones Engineering & Construction Co.* 5 Cir., 47 F. (2d) 74, at page 77, The Court says:

> "That a conclusion of law may be placed in the category of findings of fact does not change the character of the conclusion, and make it something that it is not."

Union Trust Company v. *Commissioner.* 3 Cir., 84 F. (2d) 386, at 387 the Court said:

> "The decisive question is whether the deed of trust created one or five trust estates. Since this question involves the construction of a written contract it is a question of law and the board's conclusions are subject to review on appeal."

Himmel Bros. Co. v. *Serrick Corporation,* 7 Cir., 122 F. (2d) 740, at page 742, the Court said:

> At the outset it is argued by the plaintiff that we are bound by the facts as found by the District Court. ***** We are of the opinion that the rule "carries little, if any, weight in the instant matter for the reasons (1) the findings relied upon appear to be conclusions of law rather than findings of fact, and (2) substantially all the testimony in the case was taken by deposition and under those circumstances, the court below was in no better position to judge of the credibility and the weight to be given to the witnesses than this court."

The syllabus reads as follows:

> "Where district court's findings appeared to be conclusions of law rather than findings of fact, and substantially all the testimony

> was taken by deposition so that the district court was in no better position to determine credibility and weight to be given to witnesses than Circuit Court of Appeals, federal rule, prohibiting setting aside of findings of fact unless clearly erroneous, carried little weight."

Russell v. *Ely,* 67 U. S., 575, 17 L. Ed. 258.

This case is cited only as to the general proposition that the construction of a written instrument, in this case the order of June 26, 1936, is a conclusion of law. The syllabus, which is in the language of the Court, reads as follows:

> "It is the province of the court, in trials by jury, to construe instruments of writing and determine their legal effect."

In view of the statement of the Circuit Court of Appeals that "the record presents no evidence of any order of the bankruptcy court conveying to the appellant company any right, title or interest in the Roush lease," it may be contended that the Court did fully review the decision of the referee notwithstanding its statement of the rule here questioned. We respectfully submit that such a claim would be without merit.

In the first place, petitioners did not contend that there was an order *conveying* the Roush lease to it. On the contrary, the bankruptcy case was reopened for the express purpose of obtaining an order directing the trustee to assign the Roush lease to petitioner, New Southern Ohio Gas Company, for the reason that the former referee, by the order of June 26, 1936, intended to sell or "distribute" the assets of the bankrupt not theretofore sold, including the Roush lease, to New Southern Ohio Gas Company, the corporation organized

pursuant to a former order of the court "to acquire the assets of the bankrupt".

In the second place, the referee did not find that the Roush lease had not been *conveyed* to said petitioners. The referee held "that as between the estate of Southern Ohio Gas Company, bankrupt, and the corporation New Southern Ohio Gas Company, New Southern Ohio Gas Company *is not entitled* to a conveyance of whatever right the bankrupt may have had in the Roush lease." (R. 33). This conclusion of the referee was not a *finding of fact,* but a *conclusion of law* as to the effect of the order of June 26, 1936. A review of the referee's decision, therefore, required the construction of that order and a mere search of the record by the Circuit Court of Appeals to find an order conveying title which was not claimed to exist was not the equivalent of the construction of the order of June 26, 1936, and was not a review of the referee's decision determining the meaning and legal effect of that order, as required by petitioners application in the bankruptcy court and by its appeal to the Circuit Court of Appeals from the decision of the referee and the District Court.

II.

The conclusion of the referee, even if it could be regarded as a finding of fact, was subject to full review by the Circuit Court of Appeals because it resulted in a miscarriage of justice and was based upon undisputed documentary evidence not involving any question of credibility or weight.

We are not complaining because the "demonstration of plain mistake" test applied in the Sixth Circuit in cases of concurrent findings of the referee and court

is somewhat more drastic than the test in other Circuits. And we should not object to the Court's statement of its general rule without mentioning the important exception of the case before it were not one falling *within the exception.* But we submit that under the decisions of other circuits (where the exception is recognized) the harsh rule of the Sixth Circuit would not be applied in the instant case because the conclusion or "finding" of the referee resulted in unnecessary miscarriage of justice, was based upon the construction of the former trustee's order of June 26, 1936, and there was no question of credibility of witnesses nor weight of evidence and the Circuit Court of Appeals was in as good a position as the referee to reach a correct conclusion.

In Re John Koke Co. 9 Cir., 38 F. (2d) 232. Rudkin, C. J., at page 233 says:

> "Inasmuch as there was no conflict in the testimony, the rule invoked by the appellee, that an appellate court will ordinarily accept the findings of the referee approved by the trial judge, is without application."
>
> Decree reversed.

In Re Sullivan Condensed Milk Co. 7 Cir., 291 F. 66, Evan A. Evans, C. J.:

> "The referee found that this note had been paid, and his finding was confirmed by the court." Page 67. And further, "this is not a case where the Court saw and heard the witnesses whose testimony is conflicting. It is a case where the facts are stipulated and we are to make deductions from the stipulated facts. The finding of the referee is therefore entitled to no more weight

than the stipulated facts warrant. We conclude that the $4000.00 thus loaned was never repaid, and she should therefore have been allowed a claim for this amount and interest."

Reversed.

In Re Levy, 2 Cir., 92 F. (2d) 436. Mack, C. J., after stating the facts, says:

"There is no contradiction in the testimony as to these matters." And "while reluctant to reverse the findings of the referee, concurred in by the District Court, on questions of fact and good faith, we can find no evidence in the record of fraudulent intent in the omission to schedule such a claim, clearly known to at least this objecting and scheduled creditor."

Order of referee, confirmed by District Court, reversed.

U. S. v. *Georgia Railway*, 5 Cir., 107 F. (2d) 3, holds, (Syllabus)

"Where documentary and other evidence was without contradiction, Circuit Court of Appeals is not required to take facts as found by the district judge, but *must* determine legal effect of facts as presented by record, on appeal from judgment." (ITALICS OURS)

Reversed and remanded.

Norment v. *Stilwell*, 2 Cir., 135 F. (2d) 132. Syllabus.

"Where all evidence was by deposition or affidavit, the Circuit Court of Appeals was in as good a position as the District Court to appraise the evidence to determine whether the bankrupt's application for discharge had been abandoned, *and was required to do so.*" (ITALICS OURS)

Equitable Life v. *Irelan,* 9 Cir., 123 F. (2d) 462. Syllabus.

> "The federal rule relating to findings by the court was intended to accord with decisions on the scope of review in federal equity practice, wherein if testimony is by deposition, reviewing court gives slight weight to findings."

At page 464 the Court says, since all the testimony was by deposition,

> "this court is in as good a position as the trial court was to appraise the evidence and we have the burden of doing that."

American Asiatic Co. v. *Robert Dollar Co.,* 9 Cir., 1922, 282 F. 743. The Circuit Court of Appeals said, at page 746,

> "As the testimony of the witnesses in these cases was not taken in the presence of the District Judge, we, (the CCA) are to examine it and reach our own conclusions." (Cert. denied 43 Sup. Ct. 361)

Sun Insurance Office v. *Be-Matic Transport Co.,* 8 Cir., 1942, 132 F. (2d) 535. The Court said at page 536:

> "Although the trial court made findings of fact appearing in the record, it was not called upon to pass on the credibility of any witness. There was no conflict in evidence and the appeal *imposes* on this court the duty of ruling upon the questions of law presented." (ITALICS OURS)

Commissioner v. *Boeing,* 9 Cir., 106 F. (2d) 305.

> "The only evidence taken before the Board was in the form of documentary exhibits and oral testimony by the respondent and his financial secretary. The petitioner offered no evidence at the hearing before the board. There is, therefore, no conflict in the testimony." p. 307.

> "Conclusions of the Board of Tax Appeals that gains and losses from sales of timber resulted from the sale of capital assets within the statutory definition and that timber sold was not stock in trade of the taxpayer * * * were 'conclusion of law' or 'mixed questions of law and fact' subject to independent judicial review by the Circuit Court of Appeals." 2nd Syllabus.

Wigginton v. *Order of United Comm. Travelers of America;* 7 Cir., 126 F. (2d) 659;

The Court says at page 661:

> "Since the facts are not in dispute, we are free to consider them and to reach our own conclusion, untrammeled by the District Court's findings and conclusions of law."

Carr v. *Southern Pacific Co.,* 9 Cir., 1942, 128 F. (2d) 764;

The trustee in bankruptcy of the estate of Southern Pacific Golden Gate Ferries, Ltd., filed a petition for an order directing the Southern Pacific Company to turn over to the trustee certain bonds issued by the bankrupt. On appeal from an order of the District Court reversing an order of the referee, directing that the bonds be delivered to the trustee as property of the bankrupt, the Circuit Court of Appeals said, on page 768;

> "Appellant claims the findings of the referee were made on a controverted question of fact and, hence, cannot be disturbed. This is not the fact or the law. The statement in our decision in re Eastern Oil Co., 9 Cir., 100 F. (2d), 341, 342, that, "It is conceded by all the parties ******* that 'the findings of the Referee upon controverted facts will not be disturbed' " is relied upon in support of this claim. ***** However, the rule relied upon has no application for in the case at bar no question of credibility of witnesses appearing before the referee is involved. On the contrary,

> *the parties agree as to exactly what occurred and what was said, differing only as to the effect of the language used. The district judge and the judges of this court are in as good a position to interpret such language as was the referee."* (ITALICS OURS)

In the case at bar the existence of the order of June 26, 1936, and the words therein used were undisputed and the order was submitted to the referee for his construction. This Court has concisely said, "The effect of admitted facts is a question of law." *Nelson* v. *Montgomery Ward & Co.*, 61 S. Ct. 593, *595;* 312 U. S. 373; 85 L. Ed. 897.

The referee's decision results in an unnecessary miscarriage of justice and calls for a consideration of the rule as announced in other circuits.

In Re: *Bradley,* 2 Cir., 269 F. 784,

At page 786, the Court says:

> "Where both the District Court and the referee agree, their conclusions will be accepted by the Circuit Court of Appeals, *unless justice requires a different conclusion."* (ITALICS OURS)

Salsburg v. *Blackford,* 4 Cir., 204, F. 438;

At page 440, the Court says:

> "The referee and the learned judge were both of the opinion that the Receiver was properly in possession of the goods and so found. When they agree, their conclusions are accepted by this Court, *unless it is clear that justice requires us to reach a different conclusion."* (ITALICS OURS)

III.

The intent and legal effect of the order of the District Court entered June 26, 1936, (R. 8) was to sell or "distribute" to petitioner the remaining assets of the bankrupt, including the bankrupt's interest in a certain oil and gas lease known as the Roush lease.

IV.

The respondents, the Roush heirs, are not proper parties in interest and have no right to object to the relief prayed for by the petitioners, to which no creditor has objected.

Inasmuch as propositions III and IV are the questions that were presented to the Circuit Court of Appeals and not considered on the merits by that court, they are the questions that will be submitted to this Court if the Writ of Certiorari is granted. Therefore these questions are not argued at this time, but the following brief summary is offered to show the miscarriage of justice which is one of the points on which the rule of the Sixth Circuit is in conflict with the rule in other circuits.

New Southern Ohio Gas Company claimed that it is entitled, under the order of June, 1936, to all the assets of the bankrupt, Southern Ohio Gas Company. The particular asset in dispute is one oil and gas lease out of a large number formerly owned by the bankrupt. The interest of the bankrupt, Southern Ohio Gas Company, was that of lessee, 7/8 working interest. The interest of the Roush heirs was that of lessor, 1/8 royalty interest. The record is undisputed that in 1940 the Roush heirs asked that a well be drilled on the said

lease and that thereafter New Southern Ohio Gas Company and others, relying upon the company's interest and the representations of the Roush heirs, did drill a well costing thousands of dollars.

The Roush heirs now contend that the lessee interest did not pass from Southern Ohio Gas Company to New Southern Ohio Gas Company. It is certain that if it did not so pass, it did not pass to the Roush heirs but still remains an asset of the bankrupt estate. This, however, would be flatly inconsistent with the order of June, 1936, and the fact that thereafter the estate was closed.

We submit that the intention of the referee to transfer only a portion of the assets in 1932 is apparent not only from the wording of the order itself but from the fact that transfer had been contemplated and confirmed by the court over the signature of Judge Hough, the remaining assets continued to be administered by the trustee until 1936. We submit that likewise the intention of the referee to dispose of all of the remaining assets in 1936 is apparent not only from the wording of the order itself, which is not limited to any particular assets but transfers "the assets of the bankrupt," but it is also apparent from the fact that after this transfer, confirmed by the court over the signature of the referee, the estate was closed. To us, it seems absurd to contend that the second transfer and confirmation was applicable to the property already transferred and confirmed four years previously. It would have been meaningless for the referee in 1936 to again confirm the transfer that Judge Hough himself had confirmed in 1932, and yet that is the decision of the second referee.

It is apparent that the referee and trustees intended and attempted to actually sell the operating leases and

when no satisfactory offer could be had the procedure of private sale, as already begun, was followed and the property "sold" to the creditors incorporated in New Southern Ohio Gas Company. With respect to the unsold property remaining in the hands of the trustee, there was no attempt at a sale to outsiders, but a *distribution* to creditors was made June 26, 1936, by ordering "the assets of the bankrupt" transferred "to New Southern Ohio Gas Company, the corporation formed to acquire the assets of the bankrupt."

What the Roush heirs own is the lessor royalty interest which amounts to one-eighth of the production regardless of who owns the lessee seven-eighth working interest. It seems to us that the referee should not have overlooked the undisputed fact that on May 19, 1940, these same Roush heirs recognized New Southern Ohio Gas Company's title and request that a well be drilled, as well as the further fact that they represented to a well driller, Roy Proffitt, the company's title and induced him to purchase one-fourth of the working interest and contract for the drilling of the well.

If the referee's order were permitted to stand it would do the respondents, Roush heirs, no good and would result in a miscarriage of justice as to the creditors and Roy Proffitt, who has not only bought part of the working interest but has drilled the well. The Roush heirs were offered a portion of the working interest and Proffitt has offered to transfer, out of the interest he has purchased, the proper proportionate part to any creditor that may desire to participate in the development. But there are no such creditors. No creditor has objected to the sale or "distribution" of the assets of the bankrupt to the new company. It seems incredible that the Roush heirs should desire, or

should be permitted, to attempt to take the working interest away from those that have spent the money to develop the property.

Respectfully submitted,

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APPENDIX A

Decision of the Circuit Court of Appeals.

New Southern Ohio Gas Co., et al., v. *Roush, et al.*, 138 F. (2d) 411.

PER CURIAM.

This case came on to be heard upon the record and briefs and argument of counsel.

And it appearing that the referee's finding of fact that the Roush lease had not been conveyed to the appellant company was confirmed by the District Court and should not be disturbed for anything less than a demonstration of plain mistake (*Fruehauf Trailer Co.* v. *Bridge,* 6 Cir., 84 F. 2d, 660, 663; *Bagley* v. *Rowley,* 6, Cir., 127 F. 2d 139, 140);

And it appearing that the record presents no evidence of any order of the bankruptcy court conveying to the appellant company any right, title or interest in the Roush lease, and hence the finding of fact is clearly correct:

It is ordered, adjudged and decreed that the order of the District Court dismissing the petition to review the order of the referee be, and it hereby is affirmed.

Office - Supreme Court, U. S.
FILED
FEB 10 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 618.

NEW SOUTHERN OHIO GAS COMPANY AND CHARLES EBERSBACH,

Petitioners,

vs.

SYLVIA ROUSH, WILBUR ROUSH, EBER ROUSH, SADIE ROUSH GRINDLEY, GEORGE ROUSH, FLORA ROUSH, FLOSSIE ROUSH AND LILLIAN ROUSH DURST,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SYLVIA ROUSH, WILBUR ROUSH, EBER ROUSH, SADIE ROUSH GRINDLEY, GEORGE ROUSH, FLORA ROUSH, FLOSSIE ROUSH AND LILLIAN ROUSH DURST,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

We sincerely contend that the petition of the petitioners for writ of certiorari should be dismissed.

There is no federal question of substance in this case, nor does the decision of the Sixth Circuit Court of Appeals conflict with other Circuit Court of Appeals' decisions, as it would appear from the most distorted state-

ments by petitioners. A true perspective of the case may be obtained from the opinion of the referee which we reprint herewith. (Appendix I.)

JURISDICTION.

Under this heading, what they label as a question of jurisdiction for this court is only a portion of the opinion of the Court of Appeals. Upon this portion of the opinion they conclude that the opinion promulgates a rule of law in conflict with a rule of law as announced by other Circuit Courts of Appeals. For the benefit of the court we print herewith the opinion of the Circuit Court of Appeals. (Appendix II.)

QUESTIONS PRESENTED.

Under this heading counsel have attempted to elaborate on the former heading by setting forth four statements which, in substance, contain their reasons why the Circuit Court's opinion is in conflict with opinions of the Circuit Courts for the second, third, fifth, seventh, eighth and ninth circuits.

STATEMENT.

Under this heading the appellants give a very brief statement of a portion of the history of the case. We herewith submit the entire history.

Old Southern Ohio Gas Company went into bankruptcy on the twenty-sixth day of November, 1929 (R., 18). Said company operated in Meigs county, Ohio, and owned title to four operating gas and oil leases together with

the personal property required and necessary to operate the same (R., 63), and numerous other leases. Appraisers, duly appointed and familiar with the property of the bankrupt company, examined the same and listed in the appraisement as all of the bankrupt's property the four operating leases and the chattels and cash, **and did not include the Roush lease** (R., 59). Chalmers M. Parker, the attorney of record in this case for petitioners, was the attorney for the trustees in bankruptcy (R., 65 and 70). He knew what property had been appraised and what property was included in the assets of the bankrupt company.

On September 13, 1931, a petition for private sale was filed by the trustees of the bankrupt company, by Chalmers M. Parker, asking for an order of court permitting them to sell the entire assets of the bankrupt (R., 63). **The Roush lease was not mentioned in this petition.** On September 30, 1931, an order was made, pursuant to said petition, authorizing the private sale of the property as listed in the petition (R., 65).

Lillian Roush Durst, a Roush heir, on January 2, 1932, wrote a letter to the Hon. George B. Bitzer, referee in bankruptcy, in Chillicothe, O., inquiring as to what rights, if any, was claimed by the bankrupt company in and to the Roush lease (R., 72). This letter was turned over to the attorney for the trustees, Chalmers M. Parker, for reply (R., 72). On January 7, 1932, said attorney wrote to Lillian Roush Durst and advised her that the Roush lease was one of the many leases forfeited by the company long before it was adjudicated bankrupt (R., 69).

On November 4, 1932, an order was made confirming private sale (R., 5), the legality of which should be seriously questioned since it was a distribution and not a sale. Report of distribution was made on June 26, 1936 (R., 7). This was three days after the referee had given what purports to be a notice to the creditors (R., 6).

The bankrupt estate was kept open until June, 1936 (R., 8), so that more than four years expired after the attention of the referee and the trustees' attorney was called to the Roush lease, and no claim was made during that time and no action was ever taken to try and bring the Roush lease into the estate as an asset.

On the eighteenth day of February, 1941, the New Southern Ohio Gas Company filed suit invoking the jurisdiction of the state court of Meigs county, Ohio, claiming title to the Roush lease (R., 68). The Roush heirs filed an answer and cross-petition in said cause questioning the right of the New Southern Ohio Gas Company to claim title, and in said suit the Roush heirs asked for the quieting of title to their property (R., 16), which suit is still pending.

On March 19, 1941, New Southern Ohio Gas Company filed an application to re-open the estate (R., 1). It was stated therein that "subsequent to the offer for sale of the four gas and oil leases listed by the bankrupt * * * it was discovered that the bankrupt was the owner of a fifth lease, known as the Roush lease, which it had failed to list among its assets and which was covered by the same first mortgage."

The Roush lease was never covered by the first mortgage. Quoting from the record (R., 43), "Likewise, it"

(Roush lease) "has been stipulated that it was not mentioned in the mortgage held by the secured creditors, and in fact the lease was dated after the mortgage."

The first mortgage under which the petitioners claim was dated February 4, 1925, while the Roush lease was dated April 21, 1925 (R., 69).

Thereafter, the Roush heirs were made parties in the bankruptcy matter and filed their motion (R., 9) asking the court to set aside its order to reopen said estate for the chief reasons, that there were no newly discovered assets, and that the New Southern Ohio Gas Company acquired only the assets of the bankrupt company on distribution as were listed in the petition for private sale.

The court overruled this motion (R., 31). Thereupon, June 13, 1941, New Southern Ohio Gas Company and Charles Ebersbach, an alleged creditor, filed an application (R., 10) in which it was asked that "the trustees be authorized and directed to execute to New Southern Ohio Gas Company a formal assignment of all the right, title and interest of Southern Ohio Gas Company in and to the Roush lease described in this application." To this application the Roush heirs filed their answer.

This application was formally set for hearing before the Hon. G. H. Butt, referee, and was heard upon the application, answer of Wm. D. Roush heirs, affidavits, and stipulations (R., 32). Mr. Parker stated before Hon. G. H. Butt, referee, that his clients were relying on an oral order made by Judge Hough, district judge. This oral order was never made a part of the record. The referee, under date of December 31, 1941, by order denied

said application (R., 32). January 6, 1942, a petition for review was filed (R., 34). December 14, 1942, said petition in review was found to be not well taken and same was dismissed (R., 47).

Thereupon, the petitioners filed an appeal in the Circuit Court of Appeals where the case was heard on the same evidence and record as was made in the bankruptcy court, and which is now designated as transcript of the record in this cause. Chalmers M. Parker told the Circuit Court of Appeals his clients were relying on the oral order of Judge Hough for title to the Roush lease.

ARGUMENT.

I.

Jurisdiction.

There is no grave importance to the questions raised by the petitioners. Their chief complaint is that the Circuit Court of Appeals treated the referee's conclusions as "referee's finding of fact that the Roush lease had not been conveyed to the appellant company." Petitioners complain that the Circuit Court of Appeals deprived them of full review on the merits in affirming the District Court.

The Sixth Circuit Court held,

> "And it appearing that the record shows no evidence of any order of the bankruptcy court conveying to the appellant company any right, title or interest in the Roush lease, hence the finding of fact is clearly correct."

The petitioners would have this court review the record since they complain the Sixth Circuit Court deprived them of such a review. The Circuit Court very pointedly in its opinion said that a complete review of the record, facts and law had been made by that court.

It has long been recognized by this court a writ of certiorari will not be granted to review evidence.

United States v. Johnston, 268 U. S., 220, at page 227 of the opinion by Mr. Justice Holmes:

> "We do not grant a certiorari to review evidence and discuss specific facts."

General Pictures Co. v. Electric Co., 304 U. S., 175, the court says, at page 178:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. N. C. Public Service Co., 263 U. S., 508; United States v. Johnston, 268 U. S., 220, 227. Moreover, the decisions on that point rests on concurrent findings. They are not to be disturbed unless plainly without support."

State Farm Insurance Co. v. Coughran, 303 U. S., 485, at page 487, the court says:

> "Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial court supported its judgment. To review the evidence was beyond the competency of the court."

II.

Does the Opinion as Pronounced by the Sixth Circuit Promulgate a Rule Different From That of the Second, Third, Fifth, Seventh, Eighth and Ninth Circuits?

2 Cir. **Frederick v. Baxter Arms Corp.**, 107 F. (2d), 736, quoting from the syllabi:

> "A bankruptcy trustee's appeal * * * must fail, unless trial court's finding * * * is clearly erroneous. Rule of Civil Procedure for District Courts, Rule 53(e), 28 U. S. C. A., following Section 723c."
>
> Also **Corbett v. Halliwell**, 123 F. (2d), 331.

Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 119 F. (2d), 704, at page 705, the court says:

> "The appellee reminds us that we are not at liberty to disturb findings of fact made by the trial court unless they are unsupported by evidence or are otherwise clearly erroneous. Rule 52(a), 28 U. S. C. A., following Section 723c. * * * So long, therefore, as a finding of fact is supported by evidence and is not clearly erroneous, it is to be accepted on appeal as verity."
>
> Also same Circuit, **Anthony P. Miller, Inc., v. Needham, et al.**, 122 F. (2d), 710.

The same rule has been promulgated by the various circuits in the following decisions:

Fifth Circuit—

Case of **Collier v. Union Central Life Ins. Co.**, 100 F. (2d), 411, and

Case of **Butex Gas Co. v. Southern Steel Co.**, 123 F. (2d), 954.

Seventh Circuit—

Case of **Bradley, et al., v. Smith**, 114 F. (2d), 161.

Eighth Circuit—

United Drug Co. v. Obear Nester Glass Co., 111 F. (2d), 997, and
McIntosh v. Wiggins, 123 F. (2d), 316.

Ninth Circuit—

Occidental Life Insurance Co. v. Thomas, 107 F. (2d), 876, and
U. S. v. Foster, 123 F. (2d), 32.

We believe that the Circuit Court of Appeals in the present case is in agreement with these other Circuits above enumerated, and about which the petitioners complain. We believe that "clearly erroneous" is just another way of saying "plain mistake," as was used by the Circuit Court in the present case.

We, therefore, do not see where the decision of the Sixth Circuit has promulgated a rule different than the rule indicated in the other Circuits.

III.

Did the Circuit Court of Appeals Properly Review the Record?

It most assuredly did. Mr. Parker, attorney for the petitioners, in the hearing before the referee and again in his oral argument before the Sixth Circuit Court, stated that his clients were relying on an oral order of Judge Hough. Nowhere in the record is there any such order, nor is there any reference made to such in the transcript of record.

Nowhere in the record in this case is the Roush lease mentioned prior to the closing of the bankrupt estate under the order of June, 1936, upon which the petitioners rely. The Roush lease was not listed as an asset, was not referred to in the petition to sell, order or sale, or order confirming distribution. Judge Martin of the Sixth Circuit inquired of Mr. Parker if there might not have been more bidders and possibly a better bid had the Roush lease been offered for sale as an asset along with the other leases.

Since there is no evidence of any type or character in reference to the Roush lease in the record in the bankruptcy proceedings prior to the order under which petitioners claim, we feel the referee, the District Court and the Circuit Court of Appeals have been correct in holding that on the record made all orders have been correct and have rendered substantial justice to all parties concerned

IV.

Did the Order of June 26, 1936 (R., 8) Sell or "Distribute" the Roush Lease?

The petitioners on page 21 of their brief say, "The intent and legal effect of the order of the District Court entered June 26, 1936 (R., 8), was to sell or 'distribute' to petitioner the remaining assets of the bankrupt, including the bankrupt's interest in a certain oil and gas lease known as the Roush lease."

We believe that no one seriously contends a sale of the Roush lease was ever had. We do not know of any provisions of the Bankruptcy Act or General Orders in Bankruptcy where a distribution can be made of property from the bankrupt to a small part of its creditors without formally conducting a sale.

In this case, the New Southern Ohio Gas Company, who claims to be the purchaser of all the assets of the bankrupt company, had the assets distributed to it because the stockholders of the new company held a portion of the first mortgage bonds of the old company. As such distributee it also received certain chattel property not covered by the first mortgage. The Roush lease was not in existence at the time the mortgage was executed.

We direct the court's attention to the order of distribution (R., 63) for reference, for this court to determine what the distributee received. No reference is made to the Roush lease. The Roush lease was not before the

court and no order was ever made affecting it. If the Roush lease was an asset it should have been brought into the bankruptcy court and sold as an additional asset since the mortgage under which petitioners claim gave them no right to the lease. It was an asset for the benefit of all creditors.

V.

Petitioners Make Claim That the Roush Heirs Are Not Proper Parties.

The petitioners are claiming the property of the Roush heirs by reason of bankruptcy proceedings. The petitioners, under date of June 13, 1941, after the estate had been reopened (R., 10), petitioned the bankruptcy court for an order asking that it be given a formal assignment of an interest to lands of the Roush heirs. The Roush heirs appeared in court and in formal hearing resisted this application. It was upon the evidence adduced at this hearing, which is of record in this case, that the issue of the existence and ownership of the Roush lease was determined.

Section 23 of the **Bankruptcy Act**, U. S. Code, Title II, Chapter 4, Section 46, provides:

> "The United District Courts shall have jurisdiction of all controversies at law and in equity, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees."

Collier on Bankruptcy, 14th Edition, Vol. 2, page 449, Section 23.04.

> "In speaking of controversies in relation to jurisdiction, the intent here is to consider disputes or controversies arising in the course of bankruptcy proceedings between claimants and the trustee or receiver regarding property claimed to be part of the estate."

Under the rule and the above statement, there is no question but what the Roush heirs, in resisting the claim asserted to their property, are adverse claimants and proper and necessary parties.

Respectfully submitted,

ARTHUR L. ROWE,

Attorney for Respondents.

McGHEE, ROWE & EVANS,

Of Counsel.

APPENDIX I.

Memorandum.

By a recent order of this Honorable Court, the above named cause which had been theretofore closed, was reopened and referred to the undersigned referee for further proceedings. Subsequently thereto, a trustee was duly elected at a regularly noticed hearing, and he having qualified, took charge of the further administration of the estate.

Thereafter, on June 13, 1941, an application was filed in said proceeding by New Southern Ohio Gas Company, "a corporation composed of creditors having claims secured by first mortgage, and Charles Ebersbach, a creditor" which said application concluded with the following prayer:

> "Wherefore, your petitioning creditors pray that the trustee be authorized and directed to execute to New Southern Ohio Gas Company a formal assignment of all the right, title and interest of Southern Ohio Gas Company in and to the Roush lease described in this application, the four leases listed by the bankrupt, known as the Cross, Cotterill, Camden and Krider Leases, and any and all other leases in which the bankrupt may have had some right, title or interest; that the trustee be also authorized and directed to execute to New Southern Ohio Gas Company a bill of sale transferring all of the right, title and interest of Southern Ohio Gas Company, bankrupt, in and to any and all personal property of the bankrupt of whatsoever nature and wheresoever situated; and that said trustee be authorized and directed to take such steps in the Cause No. 9929, pending in the Common Pleas Court of Meigs county,

Ohio, as may be for the best interests of the creditors."

To this application is attached an exhibit, in the form of an answer and cross-petition filed by the defendant Roush Heirs, in Cause No. 9929 pending in Common Pleas Court of Meigs county, Ohio. (A copy of said application and exhibit is attached hereto as Exhibit R-1).

Upon application of the Roush Heirs, they were made parties to this proceeding before the referee and on November 6, 1941, filed their answer to the aforesaid application of New Southern Ohio Gas Company and Charles Ebersbach herein.

From an examination of the pleadings aforesaid, it is apparent that a dispute exists as to whether or not the New Southern Ohio Gas Company has a leasehold interest in real estate belonging to the Roush Heirs. This dispute became a lawsuit in Cause No. 9929 brought by the applicant against the Roush Heirs. During the pendency of that suit, this case was reopened and the applicants now seek a conveyance from this trustee of the Roush lease and all other property of the bankrupt, including four other leases.

A detailed consideration of the application filed in this court and of the answer thereto, can be of little or no benefit. It is the contention of the applicants that they are entitled to a conveyance from this court of all property of the bankrupt, including four leases and the Roush lease as a fifth lease. This the Roush Heirs oppose and contend that neither the bankrupt estate nor the applicants have any interest in their real estate.

Upon due notice, the application and the answer thereto came on to be heard before the referee at a legally noticed hearing at which both parties were represented. A record was taken of the proceedings and is submitted herewith.

It will be noted from an examination of the record that very little evidence was offered. Upon motion, the files of the case were admitted, with the understanding that the pertinent parts thereof would be pointed out. It developed that these parts of the record were limited to the orders by which title to certain property was purportedly passed from the Trustee in Bankruptcy to the corporate applicant herein. As shown by the first part of the record, certain matters were stipulated and these are of course considered as facts in the case. Affidavits as shown by the record were offered and admitted in evidence, but the affidavits offered do not serve in any way to support the contention of the applicants herein.

It may be truthfully and accurately said that there is but one question for decision and that is:

> "Is the New Southern Ohio Gas Company entitled to a conveyance from the trustee of this court, of the Roush lease and other property heretofore not specifically mentioned in the orders and papers authorizing the sale of certain assets of the bankrupt?"

There is no disposition evidenced by any of the parties hereto to deny that the applicants are entitled to a conveyance of the property specifically listed in such orders and papers, including the four leases, but excluding the Roush lease. This situation then resolves itself into a question of whether or not the New Southern Ohio Gas

Company is entitled to a conveyance of the Roush lease and until this question can be answered in the affirmative, there is no need to consider the rights of the Roush Heirs as compared with the rights of the corporate applicant. It is only necessary to consider the rights of the corporate applicant as compared with those of the estate and it is to this phase of the question that the referee has limited himself in his consideration of the matters presented.

In the opinion of the referee, any title that the corporate applicant may have to the Roush lease, must be founded upon a conveyance made or authorized through this court. It is therefore necessary to examine the various documents and papers by means of which transfer of any title which the bankrupt may have had to the Roush lease, may have been conveyed by authority of this court, or which may have authorized a conveyance without amounting to a conveyance.

It may be stated that the Roush lease was not scheduled by the bankrupt and that it was not mentioned in any part of the record during the first administration of this estate. Likewise, it has been stipulated that it was not mentioned in the mortgage held by the secured creditors, and in fact the lease was dated after the mortgage.

In so far as the file shows in this case, there was but one proceeding initiated aiming toward the transfer of title to the property of the bankrupt. This was begun on September 14, 1931, by the filing of a petition for private sale which was filed on behalf of the three trustees by Chalmers Parker, their attorney. The property covered by this petition is specifically set forth therein as being comprised of the Cross lease, Cotterill lease, Camden

lease, Kreider lease and "on the above property is located 4 powers to pump the property which includes engines, power houses, shackle lines, tanks, pipe and tubing." No other property of any kind is referred to in said petition, a copy of which is attached hereto as "Exhibit R-2." The prayer of the petition was for an order to sell "free and clear," at private sale.

The next material paper appearing in the file is an order to sell, which again recited the exact descriptions of the four leases as set forth in the petition to sell and again specifically included the "4 powers to pump the property which includes engines, power houses, shackle lines, tanks, pipe and tubing." A copy of said order is attached hereto as "Exhibit R-3" and it clearly shows upon its face that it is an order to sell at private sale as it purports to be, and that it specifically covers only the property covered in the petition. There is no general clause which could be construed as covering any other property. This order was signed by Referee Bitzer and filed on September 30, 1931.

The next step in the transaction was the report of private sale and request for instructions filed November 4, 1932. A copy of said report being attached hereto as "Exhibit R-4." The report shows that the property was offered at private sale and the creditors elected to sell the property to a corporation to be formed of creditors. The prayer is for the confirmation of said sale and covered only "four (4) leases, together with the buildings, and equipment located thereon."

This private sale was confirmed by an order confirming private sale, which was filed November 4, 1932, and which

was issued by Judge Hough. The language of the order with reference to the property sold being: "four (4) leases together with buildings and equipment located thereon." A copy of said order is marked Exhibit R-5 and attached hereto.

The next order which sheds light on the situation was that confirming distribution of the assets of the bankrupt pursuant to former order. This was preceded by a report of distribution of the assets of the bankrupt pursuant to former order. It merely recites that "distribution of the assets of the bankrupt has been made pursuant to the former order of the court herein." A copy of said report is attached hereto as "Exhibit R-6." An examination of the report will show that it has been inaptly designated for it does not attempt to show what property has been distributed except by reference to prior orders which have been hereinbefore referred to. The order following such report (a copy of which is attached hereto as "Exhibit R-7") is in the same general terms as the report. It can in no way be taken to enlarge the order of sale.

It is the conclusion of the referee that under the circumstances, the New Southern Ohio Gas Company took no interest whatever in the Roush lease and that if the bankrupt estate has, or had any interest therein, which is still existing, that interest is still, in so far as these petitioners are concerned, in the hands of the Trustee in Bankruptcy of the former corporation. Having gone through definite proceedings to acquire certain specific property of the bankrupt, certainly the petitioning corporation cannot thereby claim to have acquired other property of the bankrupt which was given absolutely no

mention in the proceedings to sell and the proceedings of sale. The doctrine and contention advanced by the petitioning corporation is to the referee, strange and without foundation in law.

The prayer of the petition has therefore been granted only in so far as it sought a conveyance of the property listed in the proceedings for sale and of sale; in so far as the petition seeks a conveyance of any possible interest in the Roush lease, it has been denied by the referee.

G. H. Butt.

APPENDIX II.

Judgment.

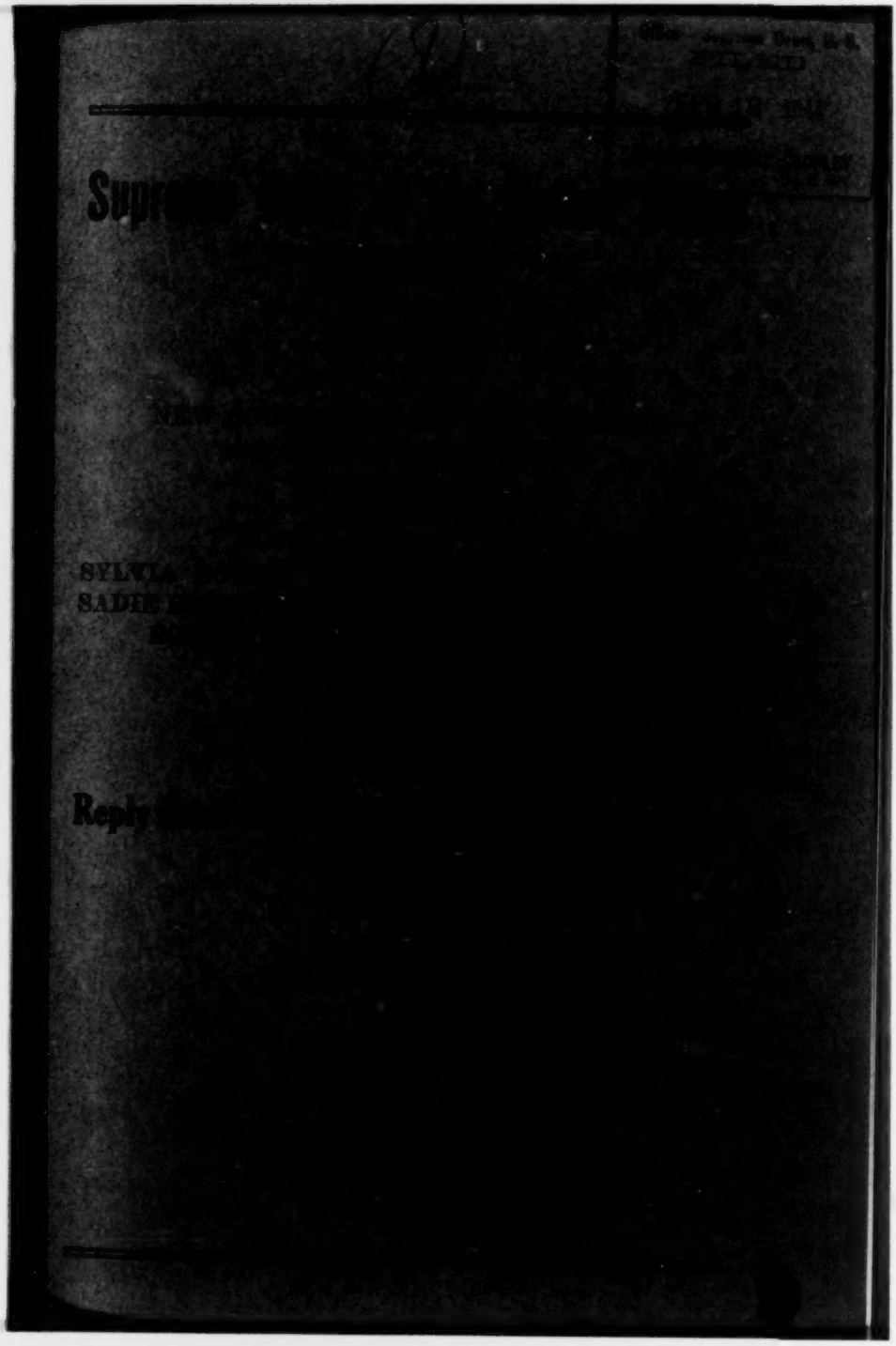
(Entered October 21, 1943.)

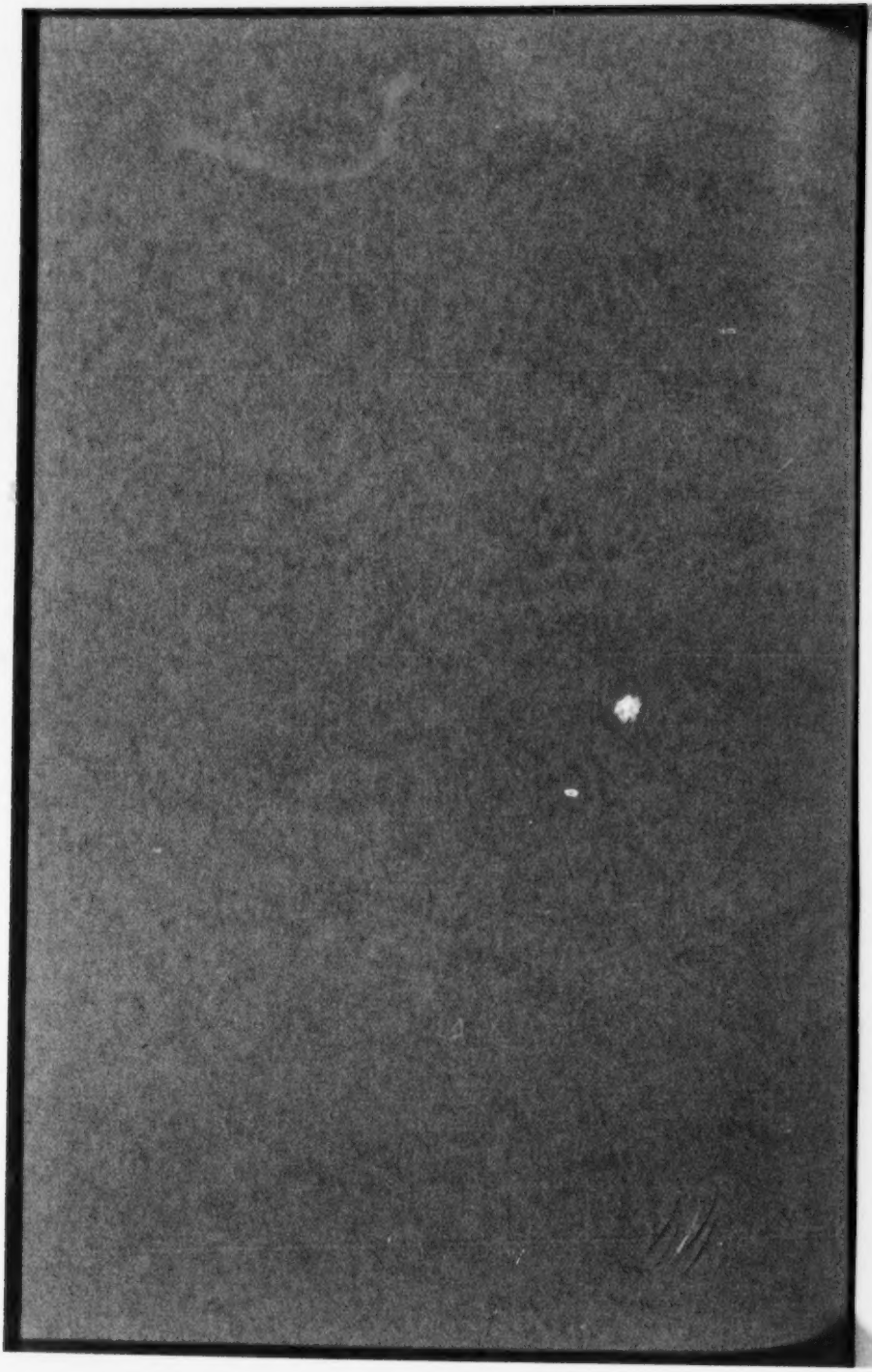
This case came on to be heard upon the record and briefs and argument of counsel.

And it appearing that the referee's finding of fact that the Roush lease had not been conveyed to the appellant company was confirmed by the District Court and should not be disturbed for anything less than a demonstration of plain mistake [Fruehauf Trailer Co. v. Bridge, 84 Fed. (2d), 660, 663 (C. C. A. 6); Bagley v. Rowley, 127 Fed. (2d), 139, 140 (C. C. A. 6)].

And it appearing that the record presents no evidence of any order of the bankruptcy court conveying to the appellant company any right, title or interest in the Roush lease, and hence the finding of fact is clearly correct:

It is ordered, adjudged and decreed that the order of the District Court dismissing the petition to review the order of the referee be, and it hereby is, affirmed.





Supreme Court of the United States

OCTOBER TERM, 1943

No. 618

NEW SOUTHERN OHIO GAS COMPANY
and CHARLES EBERSBACH,
Petitioners,

vs.

SYLVIA ROUSH, WILBUR ROUSH, EBER ROUSH, SADIE ROUSH GRINDLEY, GEORGE ROUSH, FLORA ROUSH, FLOSSIE ROUSH and LILLIAN ROUSH DURST,
Respondents.

Reply Brief of Petitioners for Writ of Certiorari

We feel that this short reply brief is adequate, but if a more complete analysis of any portion of respondents' brief is desired it will be readily found in the Appendix, which is not submitted as a part of this brief, but is attached for possible convenience.

I. The cases cited on page 7, holding that a writ of certiorari will not be granted to review evidence, are not in point because the petitioners seek no such relief.

II. The cases cited on pages 8 and 9, in an attempt to show lack of conflict, are mostly not in point. To the ex-

tent that they are in point (e. g. Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir.) they demonstrate the conflict complained of.

III. The argument on page 10 is based upon assumed facts not supported by the record, and in fact largely contradicted by the record.

IV. and V. The remainder of the brief is devoted to argument on the merits and not on the question now before the court.

The foregoing disposes of all of the brief except the Statement. This case does not turn upon facts, but upon the proper construction of a written order of the court. However, we do respectfully challenge one sentence appearing on page 5 of respondents' brief:

> "Mr. Parker stated before Hon. G. H. Butt, referee, that his clients were relying on an oral order made by Judge Hough, district judge."

Counsel for petitioners made no such statement. Counsel for respondents well know that the transcript of the hearing or oral argument before the referee, to which they refer, has not been made a part of the record because it is not pertinent to the question appealed, namely, the proper construction of the order of June 26, 1936.

Petitioners claim nothing for said transcript. If respondents had intended to claim anything for it they should have had it included in the record either at the time of the designation or later when they added a supplement to the record. If respondents produce the record it will not show the alleged statement nor anything like it. On the contrary, it *will* show that counsel stated repeatedly that New Southern Ohio Gas Company was relying upon and asking for the carrying out of the written order of June

26, 1936, which he read at the request of the referee, and a copy of which the referee marked "Exhibit 3". All of this would be found on pages 6, 7, 8, 9, 22 and 37 of that transcript. Furthermore, on page 25 would be found the following:

> "THE REFEREE: That being true, I have asked counsel upon each side whether or not the orders in question were those which had been marked Exhibits 1, 2, and 3 in this case were the only orders in point and I believe *it has been agreed that these are the only orders in point* upon this question. [Italics ours]
> MR. ROWE: That is right"

"Exhibit 3" above referred to is a copy of the bankruptcy court's order filed June 26, 1936. It was not oral. It was written. Petitioners rely and have always relied on that written order. They have never relied and have never stated that they relied on an oral order.

In view of the foregoing we feel that the Court will find it unnecessary to read, and probably even unnecessary to refer to, the Appendix attached to this brief.

Respectfully submitted,

CHALMERS M. PARKER,
Attorney for Petitioners.

ROBERT D. TOUVELLE,
DAVID H. THOMAS,
Of Counsel.

APPENDIX

CASES CITED BY RESPONDENTS

(No new cases are cited in this Appendix. This is an index to petitioners' comments on the authorities cited by respondents.)

PAGE

Anthony P. Miller, Inc., v. Needham, et al., 122 F. (2d), 710 iv

Bradley, et al., v. Smith, 114 F. (2d), 161 vi

Butex Gas Co. v. Southern Steel Co., 123 F. (2d), 954 vi

Collier v. Union Central Life Ins. Co., 100 F. (2d) 411 v

Corbett v. Halliwell, 123 F. (2d), 331 iii

Frederick v. Baxter Arms Corp., 107 F. (2d), 736 ii

Occidental Life Insurance Co. v. Thomas, 107 F. (2d), 876 viii

Kuhn v. Princess Lida of Thurn & Taxis, 119 F. (2d), 705 iv

McIntosh v. Wiggins, 123 F. (2d), 316 viii

United Drug Co. v. Obear Nester Glass Co., 111 F. (2d), 997 vii

U. S. v. Foster, 123 F. (2d), 32 ix

APPENDIX

ARGUMENT

I

Respondents' authorities (Respondents' Br. 7) that a writ of certiorari will not be granted to review evidence are not in point because petitioners seek no such relief. They simply maintain, and have maintained, that

"The referee in bankruptcy was required to determine the legal effect of a certain order made by a former referee (R. 8) and in so doing reached not a 'finding of fact' but a conclusion of law." (Br. 11).

The petitioners are respectfully asking that the writ of certiorari be granted in order that they may fully submit propositions III and IV of their main brief (Br. 21), neither of which requires a review of evidence.

II

This section of the brief goes to the question as to whether the rule of the Sixth Circuit is in conflict with the rule of other circuits. In our main brief we maintained (Br. 3) that the rule of the Sixth Circuit is in conflict with the correct rule of other circuits in two respects:

1. The referee in bankruptcy, in determining the question submitted to him, was required to construe and to determine the legal effect of an order entered by a former referee (order of June 26, 1936, R. 8) and such construction, under the correct rule, (Second, Third, Fifth, Seventh and Eighth Circuits) is reviewable for the reason that it is not a "finding of fact" but a conclusion of law not binding upon the reviewing Court.

2. The rule in the Circuit Court of Appeals for the Sixth Circuit, applied in this case, is in conflict with the correct rule (Second, Fifth, Seventh, Eighth and

> Ninth Circuits) whether the referee's decision was a conclusion of law or finding of fact, because in either case the "finding" resulted in a miscarriage of justice, was based upon non-conflicting, documentary evidence, not involving any question of credibility or weight, and the appellate court was in as good a position to reach a correct conclusion as was the referee.

Respondents have apparently conceded the first of those two propositions and have cited no authority on the first point. The authorities they cite appear to demonstrate that the second proposition is equally inescapable because those cases that are in point, support petitioners' second proposition. We will comment briefly on their authorities in the order in which they were cited on pages 8 and 9 of their brief.

SECOND CIRCUIT

Counsel submit two cases, *Frederick* v. *Baxter Arms Corp.*, 107 F. (2d) 736. The entire syllabus, which was quoted in part, fairly states the whole case as follows:

> Syllabus
>
> "A bankruptcy trustee's appeal from decree dismissing his action to set aside bankrupt's conveyance of realty to corporation controlled by bankrupt's mother and brother must fail, unless trial court's finding that money with which bankrupt purchased property conveyed belonged to her mother and brother is clearly erroneous. Rules of Civil Procedure for District Courts, Rule 52 (c) (2), 28 USCA, following Section 723 C."

This was an action by Frederick, trustee, to set aside bankrupt's conveyance. Complaint dismissed on the merits. Plaintiff appeals. The case turns upon discovery of whether the bankrupt or her mother and brother were the beneficial owners of the funds with which the bankrupt purchased the property. The court thoroughly reviewed

the evidence and commented at length thereon and concluded

> "Under these circumstances we do not feel called upon to set aside the conclusion of the court below that the property transferred by Elizabeth Bunze (bankrupt) to the Baxter Arms Corporation belonged in equity and good conscience to her mother and brother."

By no stretch of the imagination is the above a case in which the appellate court declined to review a finding based upon undisputed documentary evidence not involving any question of credibility or weight.

Corbett v. *Halliwell*, 2 Cir., 123 F. (2d) 331.

This case was an action at law to recover compensation for legal services. It was tried to the court without a jury, the trial judge making detailed findings of fact.

The Court says, (Per Curiam)

> "In actions tried upon facts without a jury, findings of fact made by court shall not be set aside unless clearly erroneous."
>
> "It is sufficient to say that we have examined the record and are satisfied that the findings are not 'clearly erroneous', but are supported by substantial evidence."

This case certainly does not support the claim of respondents, nor is it in conflict with the authorities relied on by petitioners. In fact, it shows that in the Second Circuit, the Court will examine the record to determine whether the findings of the trial court, *even when sitting as a jury*, are erroneous. In the case at bar the Appellate Court was asked to review the conclusion or "finding" of the referee based upon undisputed documentary evidence involving no question of weight or credibility.

THIRD CIRCUIT

In our brief (Br. 3) we mentioned the Third Circuit only in connection with our first proposition, namely, that the referee's determination of the legal effect of the order of the former referee was not a "finding of fact" but a conclusion of law not binding upon the reviewing court. We did not mention the Third Circuit among those with which the decision of the Sixth Circuit on our second proposition (now under consideration) is in conflict; but from the case cited by the respondents it appears that the Third Circuit might well have been included. Counsel quotes from a paragraph of the decision in *Kuhn* v. *Princess Lida of Thurn & Taxis*, 3 Cir., 119 F. (2d) 704. From the paragraph immediately following counsel's quotation (p. 705) we read

> "The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings" (p. 705) * * * "Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. * * * An incorrect conclusion by a trial court qualified as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52 (a) specifically provides." *Reversed and remanded.*

From the foregoing it appears that the rule of the Third Circuit also is what we have shown to be the rule of the Second, Fifth, Seventh, Eighth and Ninth Circuits. (Br. 3 and 16).

The other case cited from the Third Circuit, *Anthony P. Miller, Inc.* v. *Needham, et al.*, 122 F. (2d) 710, is not in point. This was an action by a general contractor upon the bond of a sub-contractor. One of the defenses was fraud in obtaining the bond (the other defense being over-

payments). The complaint was dismissed by the trial court. The judgment was *not* affirmed but was *reversed* and remanded by the appellate court. Furthermore, the appellate court said

> "The learned trial judge dismissed the complaint. He refused to make the finding of fraud contended for by the defendant, although he did not find that there was not fraud."

From the foregoing it is clear that the case cited is not in point. The appellate court did not (as did the Sixth Circuit in the case at bar) decline to review the finding of the trial court and sustain the judgment. On the contrary, there was no finding either one way or the other and the judgment was reversed.

FIFTH CIRCUIT

Two cases are cited from this circuit. The first, *Collier v. Union Central Life Ins. Co.*, 100 F. (2d) 411, was a suit to foreclosure mortgage liens. Appellant, defendant in the lower court, pleaded homestead, and sought concellation of the liens. Plaintiff (appellee) denied that the property was homestead, and also pleaded that appellant was estopped to claim that it was. Court made findings of fact.

After reviewing the evidence, the Court says at page 414,

> "Both, then, because by his acts, representations and conduct in securing the loans, appellant is estopped to assert the homestead claim, and because, estoppel aside, he has failed to maintain it, the judgment was right."

Although recognizing the rule that an appellate court is bound by the finding of the trial court, unless clearly

erroneous, the appellate court did not decline to review the evidence, but upon consideration of the evidence found that the finding of the lower court was not clearly erroneous. Such a decision is not in conflict with the rule relied on by us, (Br. 17), that where the evidence is without contradiction the Circuit Court of Appeals, *must* determine the legal effect of facts as presented by the record.

The second case, *Butex Gas Co., et al.*, v. *Southern Steel Co.*, 123 F. (2d) 954, was an appeal from a judgment awarding plaintiff damages and an injunction in a patent infringement action. At page 955, the court says

> "The grant of a patent is presumptive evidence of its validity and the finding of a District Judge as to a fact is entitled to great weight. *But when the full facts as to what constitutes the invention are, as here, undisputed*, it remains at last, for this court, giving due regard to the weight to be given to the grant of the patent and the finding of invention by the District Judge, to examine the record for itself and to determine whether, within the meaning of the statute conferring patent monopoly, there is invention and therefore patent ability." * * * "The patent claims sued on are invalid for want of invention, the judgment is reversed and the cause is remanded with directions to dismiss the bill." [Italics ours.]

Thus, it appears that the court did not accept the findings of the district judge, but examined the undisputed facts for itself and *reversed* the district court. This case is certainly not out of line with the case we cited (Br. 17) from the Fifth Circuit, but even supports our position.

SEVENTH CIRCUIT

The one case cited, *Bradley, et al.*, v. *Smith, Collector of Internal Revenue*, 114 F. (2d) 161, is not in point because it was not a case of accepting a finding based upon

undisputed documentary evidence, etc. The court did review the evidence and it must have been conflicting because the majority held

> "The question presented by this record is whether or not a gift made * * * within two years of the death of the decedent was made in contemplation of death."
>
> "The trial court had evidence before it from which it could reasonably infer that the transfer was not made in contemplation of death."

and the *dissenting* opinion reached the opposite finding

> "My examination of the record impels me to the conclusion that there is no substantial evidence from which any life motive may be inferred; on the contrary, it is clear that the decedent was contemplating death and that he was making the gift as a substitute for a testamentary disposition."

In the case at bar we have no conflicting evidence. There is no dispute as to the existence and exact language of the court order of June 26, 1936. It should be properly construed and given its true legal effect.

Eighth Circuit

From this circuit respondents cite two cases, the first being *United Drug Co.* v. *Obear Nester Glass Co.*, 111 F. (2d) 997. At page 1000 the court says:

> "An examination of the record is convincing that the court did not err in finding infringement. The similarity of appearance of the two marks, of the spelling, of the sound, and the fact that the marks are used on the same kind of merchandise, all justify the inference that purchasers are likely to be deceived by defendant's mark."

It is apparent that this is not a case in which the appellate court accepted a finding of the lower court. There ap-

pears nothing contrary to the correct rule of the Eighth Circuit, which we quoted (Br. 18) as follows:

> "Although the trial court made findings of fact appearing in the record, it was not called upon to pass on the credibility of any witness. There was no conflict in evidence and the appeal *imposes* on this court the duty of ruling upon the questions of law presented." [Italics ours.]

A like comment applies to the second case cited, *McIntosh* v. *Wiggins*, 123 F. (2d) 316. The lower court had found as a fact that there was no fraud, accident or mistake. The appellate court reviews the evidence and the majority opinion states, page 322,

> "We are satisfied that there is no factual basis to support "the claim of fraud, accident or mistake"".

NINTH CIRCUIT

Respondents cite two cases. Before commenting thereon permit us to restate the correct rule of the Ninth Circuit as we quoted it on page 16 of our brief.

> "Inasmuch as there was no conflict in the testimony, the rule invoked by the appellee, that an appellate court will ordinarily accept the findings of the referee approved by the trial judge, is without application."
>
> "Decree reversed."

Against the foregoing counsel cited first *Occidental Life Ins. Co.*, v. *Thomas*, 107 F. (2d) 876. Action by Fay Thomas for double indemnity under life policy. Judgment for plaintiff. Affirmed. At page 878, the court says

> "The trial court's findings are not to be disturbed or appeal unless they are clearly erroneous. Rule 52 (a) * * * We are satisfied that the proof is sufficient to support the finding that the insured is dead."

After reviewing facts the court says, at p. 879,

> "When all the facts are put together, they point with at least fair probability to the insured's having perished in the lake."

Here again we fail to find anything like the acceptance of findings based upon non-conflicting testimony. Nor do we find it in the second case cited,

U. S. v. *Foster,* 123 F. (2d) 32. A claim to recover damages for alleged conversion. Garrecht C. J., at page 34, says

> "The 'statement of facts' in the record is so obscure, uninformative and incomplete as utterly to prohibit a decision by this Court to the effect that the findings were not based upon sufficient substantial evidence. The appellant has failed to bring before us such a record as would compel an overthrow of the findings made below, and the presumption of correctness which attaches to the findings made by a trial court is sufficient to withstand an attack *of the sort here made, upon an obviously incomplete record.*" [Italics ours.]

As to the concluding paragraphs on page 9 we can only repeat from page 15 of our main brief:

> "We are not complaining because the 'demonstration of plain mistake' test applied in the Sixth Circuit in cases of concurrent findings of the referee and court is somewhat more drastic than the test in other Circuits. And we should not object to the Court's statement of its general rule without mentioning the important exception if the case before it were not one falling *within the exception.* But we submit that under the decisions of other circuits (where the exception is recognized) the harsh rule of the Sixth Circuit would not be applied in the instant case because the conclusion or 'finding' of the referee resulted in unnecessary miscarriage of justice, was based upon the construction of the former trustee's order of June 26,

1936, and there was no question of credibility of witnesses nor weight of evidence and the Circuit Court of Appeals was in as good a position as the referee to reach a correct conclusion."

III

On page 10 of respondents' brief counsel repeat the unsupported claim that counsel for petitioners stated orally that they "were relying on an *oral* order of Judge Hough." This we deny. It would seem strange indeed that counsel should state orally that the case rests upon an *oral* order in the face of the record and numerous briefs all showing that petitioners are and have been contending for nothing more than a proper construction of the written court order filed June 26, 1936. Opposing counsel admits (page 10) that in the Transcript of Record there is no reference to such oral order. As we pointed out above, opposing counsel did not see fit to include in the record the transcript of the hearing before the referee which would flatly refute counsel's unsupported claim. Other statements of fact on the same page are unsupported by the record.

Apparently page 10 is intended to offer the contention that the appellate court did fully review the referee's conclusion or "finding." This we anticipated and fully discussed on pages 14 and 15 of our main brief in support of our petition.

We did not ask the court to search the record to determine the existence of an order, oral or written. We asked the court to review the referee's construction of a written order made by a former referee, the existence and language of which order was undisputed, and to determine that

> "The intent and legal effect of the order of the District Court entered June 26, 1936, (R. 8) was to

sell or 'distribute' to petitioner the remaining assets of the bankrupt, including the bankrupt's interest in a certain oil and gas lease known as the Roush lease."

IV

As we have previously stated in III and IV of petitioners' brief, we believe that a discussion of the merits of this case should await the action of this Court on the petition for the writ, and that a statement of petitioners' contention as to the intent and legal effect of the order of June 26, 1936, is sufficient at this time. However, our complete disagreement with the claims of respondents impels us to reply that the problem for the referee in the reopened bankruptcy case was to give full effect to the order actually made by the court some five years prior thereto, and not to review and determine what order, in his opinion, the court *should* have made at that time, as counsel seem to be contending on page 11. No objection was made by any creditor to the disposition of the assets by the bankruptcy court. After a specific portion of the assets were in 1932 ordered transferred to the corporation of creditors, no creditor objected, when the court, in 1936, ordered the remaining assets transferred or distributed to the same creditors instead of being sold to outsiders. The time has long passed for objection, review or appeal as to the bankruptcy court's decision that certain after-acquired property was subject to the lien of the mortgage; and no creditor has to this day ever questioned the correctness of that decision. At the proper time we will submit authority holding that the failure of the involuntary bankrupt to list an asset does not prevent the transfer of title to that asset. But, as we view it, these questions are not before the court at this time.

V

The two authorities cited have no bearing upon the question now before the court, that is, whether a writ of certiorari shall be granted.

Neither do they throw any light on the question we desire to present if the writ be granted, namely, what interest have the Roush heirs (who are entitled to 1/8 of the income from the well as royalty) in taking the ownership of 7/8 of the income away from the persons that invested all the money and drilled the well, especially since the Roush heirs are attempting to take this property not for themselves but for a trustee in bankruptcy to dispose of?

But such question is not now before this court.